Supreme Court
F I L E D
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No. 96-1721

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,

Petitioner,

v.

C&L ENTERPRISES, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is an arbitration agreement contained in a contract between an Indian tribe and a non-Indian, for commercial development outside any reservation or trust land boundaries, enforceable by arbitration proceedings provided for in the agreement?

2. May an Indian tribe be sued in state court to confirm an award upon such arbitration proceedings where the agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ?

3. Does execution of such a contract and arbitration agreement constitute a waiver of any sovereign immunity from suit which Petitioner asserts existed for such commercial development outside any reservation or trust land boundaries?

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STATEMENT OF THE CASE

Petitioner presented to Respondent a proposed contract for Respondent's construction of the roof upon a bank building on non-reservation, non-trust land owned by Petitioner. While admittedly an American Institute of Architects form agreement, the contract terms and provisions not set forth in the form were drafted by Petitioner and/or its architect. The contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in any court having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(Petition at App. 36, 37, Article 10.8) (emphasis added).

Petitioner states that the architect advised Petitioner that the roof type should be changed due to birds eating holes in another foam roof. The record does not support that it was the architect's decision and makes no mention of birds damaging such a roof. Rather, the Construction

Change Directive was issued by both Petitioner and the architect.[1]

Petitioner states that C&L submitted a new or revised bid. This is a misstatement of fact. Rather, C&L offered to reduce the Contract sum by $6,600.00 pursuant to the Contract's provision that "the Contract Sum . . . shall be changed only by Change Order" which must be signed by the Owner, Contractor and Architect, and that "the cost or credit to the Owner for changes in the Work shall be determined by mutual agreement." Moreover, the record below is devoid of any evidence that the offered reduction in contract sum was $21,616.00 higher than the lowest "bid."[2]

Prior to learning of Petitioner's re-bidding of the Contract, Respondent entered into a Sub-Contract Agreement (as allowed by the Contract) with Oklahoma Roofing & Sheet Metal, Inc., on April 19, 1994. The Contract Sum remained $85,000.00 (Petitioner did not accept Respondent's offered reduction) and Petitioner had subcontracted for the services to be performed for a total cost

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[1] Exhibit "B" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

[2] Petition at App. 39, Article 13; Objection to Defendant's Motion to Dismiss, p. 2. *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

of $53,400.00. Therefore, Respondent's actual lost profit from the Petitioner's breach was $31,600.00.[3]

Petitioner states that the arbitration award was a "default award." The record does not support this. Petitioner was represented by its current counsel and repeatedly corresponded to AAA (the American Arbitration Association) setting forth fully its arguments and authorities regarding the factual issues and, specifically, arguments alleging sovereign immunity from suit. Moreover, in the arbitration hearing Respondent was required to and did present exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[4]

Petitioner complains that the arbitration award does not mention tribal sovereign immunity or explain how the award was computed. However, under Rule 23 of the Construction Industry Arbitration Rules of AAA, Petitioner could have requested a stenographic record of the proceedings.

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[3] Objection to Defendant's Motion to Dismiss, pp. 2, 3, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma;* Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

[4] Exhibits "C," "D," "E" and "F" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma;* Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

Respondent thereafter brought suit to confirm the arbitration award consistent with state law and the terms of the arbitration agreement. In response to Petitioner's motion to dismiss the state court action, Respondent specifically raised the proposition that the execution of the arbitration agreement waived whatever sovereign suit immunity existed as to the Contract at issue and that because the contract between Petitioner and Respondent was – without dispute – executed outside of Indian Country, sovereign immunity never attached and the contract was properly enforceable by arbitration and ultimately in state court.[5]

Petitioner did not timely and properly raise the federal issue of the applicability of 25 U.S.C. § 81 (1958) before the District Court. Rather, Petitioner relegated the same to a single footnote which alleges application of the statute in a purely conclusive manner without any mention of its essential elements or any factual basis for the District Court to determine its application.

Petitioner next complains that the District Court disposed of Petitioner's motion to dismiss and motion for reconsideration with general orders denying the same. However, Petitioner could have requested such specific findings pursuant to 12 O.S. § 611 (1991) whereupon the District Court would have been obligated to render separate findings of fact and conclusions of law. In the absence of the same, it is obvious that the District Court

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[5] Objection to Defendant's Motion to Dismiss, pp. 4-10, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

found merit with either or both of Respondent's contentions. That is, that sovereign immunity never attached or that the same was waived by the arbitration agreement.

Petitioner failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety days after delivery of a copy of the Award to Petitioner as required by 15 O.S. §§ 812, 813. Thereupon, Respondent filed its Motion for Confirmation of Arbitration Award (although the same was specifically contained in Respondent's Petition for Confirmation) again giving Petitioner notice of the same and the hearing set. Petitioner chose not to appear or otherwise oppose the motion and the trial Court accordingly entered Judgment confirming the Award as mandated by 15 O.S. § 811. (Petition at App. 11, 12).

Subsequently, pursuant to Oklahoma law, Respondent made an original and amended fee application giving notice of the application for fees and hearing date thereon to Petitioner. Petitioner failed to appear or otherwise respond to such fee applications and the same were granted by the Oklahoma County District Court after consideration of the detailed supporting time statements presented by Respondent's counsel. (Petition at App. 4).

Without reaching the question of whether the execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 990 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996) discussed below.

REASONS FOR DENYING THE WRIT

1. The writ should be denied because the state court of last resort reached a decision consistent with the relevant decisions of this Court.

2. The writ should be denied because the ruling of the District Court of Oklahoma County as affirmed by the Oklahoma Court of Appeals and Oklahoma Supreme Court was otherwise proper based upon the waiver of sovereign immunity by execution of the arbitration agreement and such ruling is consistent with the decisions of other United States Courts of Appeals interpreting similar arbitration clauses.

ARGUMENT

In its argument to this Court, Petitioner initially sets out authorities supporting the power of the Federal Government to regulate Indian commerce and Indian tribes – which is not disputed. Then, Petitioner embarks upon a leap of logic to assert that the State of Oklahoma is regulating Indian commerce in contravention of the Constitution.

In fact, this Court's pronouncements as to the States' authority over an Indian tribe's commercial endeavors outside of its reservation, such as in the present case, are clearly supportive of the Oklahoma Supreme Court's holdings criticized by Petitioner. It is Petitioner's broad sweeping argument of exclusive Federal Government jurisdiction over all Indian matters which ignores established precedent.

Petitioner's doomsday characterization of the Oklahoma Supreme Court embarking upon a course to "confiscate Indian lands and other assets for the benefit of non-Indians" can only be described as scandalous and in violation of Supreme Court Rule 24.6.

Proposition 1: The Oklahoma Supreme Court decision below is consistent with the relevant decisions of this Court.

Obviously, no serious consideration of a State Court's jurisdiction over disputes with Indian tribes can be attempted without consideration of this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962), and its progeny.[6] There, in reviewing the Alaska Supreme Court's decision regarding a fishing rights dispute, this Court stated:

> State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation.

Id. at 369 U.S. 75, 82 S.Ct. 571.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973), this Court considered sovereign immunity in the context of an Indian Tribe's protest of New Mexico's use tax assessment. The tax assessment related to the Tribe's construction and operation of a ski resort located outside the Tribe's trust or reservation land. This Court's opening comments have particular bearing upon the position taken by Petitioner:

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[6] Petitioner omits any reference to or discussion of *Organized Village of Kake.*

> At the outset, **we reject** – as did the state court – **the broad assertion that the Federal Government has exclusive jurisdiction of the Tribe for all purposes** and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous.

Id. at 411 U.S. 147, 148, 93 S.Ct. 1270. (emphasis added).

The Court, citing *Organized Village of Kake v. Egan*, stated:

> But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' Absent express federal law to the contrary, **Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.**

Id. at 411 U.S. 148, 149, 93 S.Ct. 1270. (citations omitted) (emphasis added).[7]

Directly on point as to whether the Petitioner's asserted Tribal immunity deprived the Oklahoma County District Court of jurisdiction to hear the state law general contract claims brought by Respondent is this Court's

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[7] Petitioner omits any reference to or discussion of *Mescalero* despite this Court's lengthy discussion of the same in a previous appeal by this Petitioner. *See Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905 (1991).

ruling in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). There, the State of Oklahoma brought an action against an Indian tribe to recover excise taxes from bingo games and cigarette sales. The tribe removed the action to the U.S. District Court and the state moved to remand. The District Court denied the motion to remand and dismissed the suit ruling that it was barred by sovereign immunity.

The Tenth Circuit Court of Appeals affirmed. This Court vacated the Tenth Circuit's decision and remanded. The Tenth Circuit Court of Appeals, on reconsideration, adhered to its original decision. This Court then granted certiorari and reversed stating:

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint" rule . . . [Jurisdiction] 'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, **unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.**' Tribal immunity may provide a federal defense to Oklahoma's claims. **But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.** The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, **and there was no independent bases for original federal jurisdiction** to support removal.
>
> **The jurisdictional question in this case is not affected by the fact that tribal immunity is**

> **governed by federal law**. As the dissent below observed, Congress has expressly provide by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities.

Graham, at 489 U.S. 840-842, 109 S.Ct. 1521. (citations omitted) (emphasis added).[8]

Remarkably, one of the more recent pronouncements from this Court regarding the territorial component of jurisdiction over Indian tribes is found in *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 907 (1991), where this Court considered sovereign immunity with respect to this same Tribe. The Court cited *Mescalero* as precedent (although distinguished it in its ruling) and quoted from the above-cited comments. In particular, this Court noted that *Mescalero* involved activity outside of the reservation. By contrast, the activity at stake in *Oklahoma Tax Commission v. Potawatomi* was on land held in trust and validly set apart by the Federal Government. This Court declined to draw a distinction between reservation and tribal trust land. *Id.* at 498 U.S. 511, 111 S.Ct. 905, 910.

The Supreme Court of New Mexico reached a conclusion consistent with the Oklahoma Supreme Court in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). There the court found that the state court may exercise jurisdiction over an Indian tribe when the tribe is engaged in commercial activity off of the reservation and is sued for breach of contract in connection with such off-reservation activity. *Id.* at 851.

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[8] Petitioner omits any reference to or discussion of *Graham*.

Petitioner incorrectly represents that New Mexico later "modified its holding." Petitioner's citation is to *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M.App. 1995), *cert. denied*, 903 P.2d 844 (N.M. 1995). In addition to being an inferior court of New Mexico, the Court of Appeals of New Mexico in *DeFeo* specifically *did not modify* the holding in *Padilla*.

The court in *DeFeo* noted that critical to the ruling in *Padilla* was the fact that the cause of action arose from off-reservation activities. In *DeFeo* the activities (the accident and injury) occurred on the reservation. The court in *DeFeo* specifically stated its ruling was consistent with *Padilla*. *DeFeo* at 1068.

The New Mexico Court of Appeals in *DeFeo* cited *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 57 (1995), only for the proposition that engagement in commercial activity in general does not strip the Tribe of its defense of sovereign immunity.

More recently, the Washington Court of Appeals followed Oklahoma and Arizona in holding that state courts have jurisdiction over breach of contract actions involving Indian tribes arising off of the Indian reservation. *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372 (Wash.App.Div.3 1996).

In *Hoover v. Kiowa Tribe of Oklahoma*, 990 P.2d 59, (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996), the Oklahoma Supreme Court specifically relied upon *Mescalero*, *Graham* and *Organized Village of Kake* in holding that a contract between an Indian tribe and a non-Indian is enforceable in state court where the contract is executed outside of Indian country.

It is upon this clear line of authority, grounded in this Court's specific discussion of the territorial component of sovereign immunity, that the Oklahoma Supreme Court affirmed the ruling of the District Court of Oklahoma County herein. Therefore, far from being out of step with Federal precedent, the State Court rulings in the case at bar are entirely within the authority prescribed by this Court and the writ should be denied.

Proposition 2: The ruling of the District Court of Oklahoma County as affirmed by the Oklahoma Court of Appeals was otherwise proper based upon the explicit waiver of sovereign immunity by execution of the arbitration agreement and such ruling is consistent with the decisions of other United States Courts of Appeals interpreting similar arbitration clauses.

Assuming, for argument only, that the Petitioner's contract with Respondent could otherwise be frustrated by sovereign immunity, Petitioner clearly and unequivocally waived suit immunity and immunity from arbitration as was necessarily determined by the District Court of Oklahoma County in denying Petitioner's Motion to Dismiss and in granting Respondent Judgment upon its Motion to Confirm Arbitration Award.

Among the courts which have specifically considered arbitration agreements such as the agreement between Petitioner and Respondent in the context of claims of sovereign immunity, the outcomes have been consistent. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756

(Alaska 1983), interpreting the effect of an arbitration clause, with terms virtually identical to the clause at issue herein, the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc., v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the Tribe was generally entitled to sovereign immunity. Likewise, as urged by Petitioner, the court acknowledged that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Id.* at 508.

On this foundation, the court considered an arbitration clause contained in the contract between the parties.

Again, the substantive provisions of the clause considered are virtually identical to the provisions of the clause at issue herein. The *Val/Del* court cited with approval both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated that:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, **after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity . . . Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona . . .**

Val/Del, at 509. (emphasis added).

In both *Val/Del* and *Native Village of Eyak v. GC Contractors* state supreme courts have considered virtually identical arbitration clauses in contracts with Indian tribes otherwise possessing sovereign immunity. Certainly, the clauses in these cases were no more explicit or unequivocal in their waiver than the clause in Petitioner's contract. In both cases, the courts found the arbitration agreements to be the very "clear" "unequivocal" and "express" waiver of immunity which Petitioner so ardently argues is required.

Despite Petitioner's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that "**judgment may be entered**

upon" the arbitration award and that the arbitration agreement "**shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**" The arbitration clause is clearly an express waiver of immunity by Petitioner as was correctly determined by the Oklahoma County District Court.

More recently, in *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not contain specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also applicable to the case at bar) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

Id. at 562.

Responding to protests of the tribe that the agreement only implied a waiver, the Court of Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." The court found an explicit waiver of sovereign immunity. *Id.* at 563.

The same result was reached in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, the tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs and the architects proceeded to arbitration upon the contract for recovery of its services rendered.

The arbitration went forward without the tribe's participation resulting in an award in favor of the architects. An action to confirm the arbitration award was stayed while the court considered whether sovereign immunity had been waived. The Seventh Circuit noted:

> If the tribe waived its sovereign immunity from suit, it may well be bound by the arbitration, which implicitly but unmistakably, by awarding TMI contract damages, determined that the contract was enforceable. If so, and if TMI wins this appeal, the case will be over without the district court's having to try the issue of the contract's validity.

Id. at 659.

The arbitration agreement at issue contained language virtually identical to the agreement between Petitioner and Respondent agreeing to submit all disputes to arbitration and providing that:

> . . . judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.

Id.

The Court, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.[9]

The court then considered whether the arbitration agreement was a clear waiver of sovereign immunity. Finding it to be a clear waiver, the court stated:

> The arbitration clause could not be much clearer . . . No one reading this clause could doubt that the effect was to make the tribe suable. The waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can

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[9] In *Prima Paint* this Court held that a federal court considering an application for stay while the parties arbitrate may consider only issues going to the making of the arbitration agreement. Claims of fraud or other defenses to the contract in general are properly to be determined by the arbitration proceedings. *Id.* at 388 U.S. 403, 404, 87 S.Ct. 1806.

> also understand the arbitration clause. The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that.

Id. at 660.

In addition, the arbitration agreement itself confers jurisdiction upon the Oklahoma state courts:

> The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

15 O.S. 1978 § 802.B.

Proposition 3: The contract at issue did not require approval under 25 U.S.C. § 81 (1958) as was necessarily determined by the arbitrator and Petitioner did not timely and properly raise this issue in the proceeding before the District Court of Oklahoma County.

Title 25 U.S.C. § 81 (1958), is not applicable to the contract and dispute at issue as the contract is not "relative to their [Indian] lands" as set forth in § 81 because (1) The construction was not on **reservation** or **trust** land; (2) Respondent did not acquire the exclusive right to manage or operate the facility; (3) The Petitioner was not forbidden to encumber the property; and (4) The operation of the facility, a bank, did not depend on the legal status of the Tribe being a sovereign entity. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th

Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993).

Petitioner cites *Narrangansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp 48 (D.R.I 1988) as "federal jurisprudence" that 25 U.S.C. § 81 pertains to all land owned by Indians regardless of how or when acquired. The single decision from the District Court of Rhode Island simply does not live up to such a characterization.

The court in *Narrangansett* relied upon *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958), finding that 25 U.S.C. § 177 applied to lands acquired by tribes through purchase. In reaching for such authority *Narrangansett* assumed incorrectly that the two statutes had a similar purpose of "providing a mechanism to regulate Indian land transactions." *Id.* at 51.

In fact the two statutes have obviously different purposes. Discussing the history of 25 U.S.C. § 177, the Tenth Circuit Court of Appeals in *Alonzo* – restating the very "unsolicited paternalism" which Petitioner decries – states:

> The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races' against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo at 196.

By contrast, the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands:

> This delineation of section 81's scope suggests that Congress was concerned about contracts for the representation of Indians' interests . . . legislative history of section 81 shows that 'contractual relations with attorneys and claims agents were foremost on Congress' mind . . . '
>
> . . .
>
> . . . Congress was concerned specifically about contracts for services such as representation of Indian interests before Congress and the pressing of Indians' claims.

See In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422, 1431, 1432 (D.Minn. 1993).

In light of the obviously differing purposes of § 81 and § 177, *Narrangansett*'s reliance upon *Alonzo* is at a minimum suspect. Moreover, it is entirely reasonable that even if 25 U.S.C. § 177 restricts conveyances of any lands from Indian tribes, 25 U.S.C. § 81 should and is nonetheless limited to services relative to reservation or trust lands.

Obviously, in any conveyance of land from an Indian tribe it will be known – at the latest upon inspection of the record title to the land – that the land is held by an Indian tribe and that therefore transfer is restricted. On the other hand, since Indian tribes may and often do own land removed from the reservation or trust territory, and since the tribe's ownership of a business on such land may be neither obvious nor expected due to the use of trade names or leases to third parties, it would indeed be an unjust trap for any service provider if Indian tribes could avoid such contracts. In other words, if Petitioner purchased a convenience store, removed from trust or

reservation land, and contracted with a third party to operate it, suppliers, mechanics, lawn care providers and others would likely contract with the third party without knowledge that the real estate was owned by Indians thereby allowing breach of the contracts with impunity.

Although most authorities setting forth the factors determining when a service contract is relative to Indian lands are relating to management contracts, such analysis has been given broader application. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993) (analysis applied to a manufacturing plant).

Moreover, cases applying § 81 overwhelmingly do so only upon the finding, *inter alia*, that the land involved was "trust" or "reservation" land. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985).

Finally, in reference to the claim of 25 U.S.C. § 81 application, Respondent specifically alleged below (both in the arbitration proceedings, in its Petition and briefing to the Oklahoma County District Court and in briefing to the Oklahoma Court of Appeals) that some or all of the funds used for construction of the bank and its roof were non-tribe funds such as Economic Development Grant or other government grant funds. At no time has Petitioner

denied this and therefore the allegation has been admitted and determined in the proceedings below. Therefore, § 81 is not applicable regardless of whether the contract was relative to Indian lands. *Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc.*, 757 F.2d 221 (10th Cir. 1985).

CONCLUSION

This Court should deny the writ of *certiorari* for the reasons cited above consistent with this Court's previous rulings upon these issues.

Respectfully submitted,

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